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(3)

Supreme Court, U.S.
FILED

No. 10-77

In The

Supreme Court of the United States

MICHAEL WILLIAMSON,

Petitioner,

v.

ADVENTIST HEALTH SYSTEM/SUNBELT, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the Eleventh Circuit Court of Appeals properly applied the established standard for direct evidence of discrimination in an employment termination case when it affirmed the District Court's summary judgment against Petitioner.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents Adventist Health System/Sunbelt, Inc., Southwest Volusia Healthcare Corporation d/b/a Florida Hospital Fish Memorial, and Memorial Health Systems, Inc. d/b/a Florida Hospital – Oceanside make the following disclosure:

Respondents Adventist Health System/Sunbelt, Inc., Southwest Volusia Healthcare Corporation, d/b/a Florida Hospital Fish Memorial, and Memorial Health Systems, Inc., d/b/a Florida Hospital – Oceanside are non-profit entities and therefore do not issue stock. The member and parent corporation of Adventist Health System/Sunbelt, Inc. is Adventist Health System Sunbelt Healthcare Corporation, a non-profit corporation. There is no parent corporation or any publicly-held corporation that owns 10% or more of any stock of these entities.

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STATEMENT

Even a cursory review of the opinion below and the Petition for Writ of Certiorari makes clear that the legal issue posed by Petitioner is not presented by this case. The question presented by Petitioner is based on a mischaracterization of the facts and the assertion of a split in circuit court authority which does not exist. The Petition seeks mere error correction where there was no error below. A brief response is warranted, however, to correct Petitioner's mischaracterization of the facts and the decisions of this Court and other federal courts of appeal. A proper evaluation of this case clearly shows that certiorari should be denied.

I. Relevant Facts

Petitioner, an African-American former employee of Medical Staffing Network, Inc. ("MSN"), was temporarily assigned by MSN to perform duties as a Licensed Practical Nurse ("LPN") at MSN clients Memorial Health Systems, Inc., d/b/a Florida Hospital – Oceanside ("Oceanside") and Southwest Volusia Healthcare Corporation, d/b/a Florida Hospital Fish Memorial ("Fish Memorial"), which are subsidiaries of Adventist Health System/Sunbelt, Inc. ("AHS"). Petitioner's App. B, 12a.

On July 3, 2006, Petitioner was assigned by MSN to work at Oceanside. Petitioner's App. B, 12a. Upon arriving at Oceanside and learning of his assignment by Charge Nurse Helen Turk ("Turk") to Patient Care Tech duties, Petitioner refused to accept the assignment. Petitioner's App. B, 21a. Petitioner alleges that Turk then asked him "Who do you think you are?" and refused to sign his MSN time slip, stating something to the effect of "get out

of here, you nigger." Petitioner's App. B, 21a. Turk denies making any racial slur, Petitioner's App. B, 21a, fn.3. There is no record evidence that Turk was the decisionmaker regarding Petitioner's future assignments at Oceanside. Petitioner's refusal to perform the duties which he was assigned provided Oceanside a legitimate, non-discriminatory reason to not request him again from MSN. There is no record evidence that Oceanside retained temporary nurses outside of Petitioner's protected class after they refused a staffing assignment. Respondents' App. A, 9.

Immediately after Petitioner's July 3, 2006 assignment at Oceanside, MSN assigned him to LPN duties at Fish Memorial. Petitioner alleges that during his assignment to Fish Memorial, the Director of the Medical Surgical Department, Jean Kaster ("Kaster"), addressed him on approximately three occasions by saying, "Hey, Mon" and joking about him coming from a "banana boat." Petitioner's App. B, 24a.

On July 26, 2006, Petitioner was assigned to work at Fish Memorial. Early in Petitioner's shift, a physician, Dr. Hood, instructed Petitioner to change a patient's medication to an anti-coagulate. *Id.* Petitioner needed to obtain the new medication from the hospital pharmacy and administer it as soon as possible. *Id.* The order was not filled by the end of Petitioner's shift. *Id.* Petitioner admitted that his failure to timely obtain and administer the medication was a critical medical error. There is no record evidence that any similarly-situated employee outside of Petitioner's protected class was treated differently under similar circumstances. Respondents' App. A, 10.

On July 28, 2006, an MSN representative contacted Petitioner and informed him that Dr. Hood was upset with his failure to obtain the medication. *Id.* Fish Memorial requested that MSN no longer assign Petitioner to that hospital. Petitioner's App. B, 24a-25a.

II. Litigation History

On January 7, 2008, Petitioner filed a Complaint against MSN and Respondents in the United States District Court for the Middle District of Florida, Orlando Division, alleging that he was terminated from employment because of his race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et. seq.* Petitioner's App. B. Petitioner also alleged that Respondents intentionally interfered with his employment contract with MSN in violation of 42 U.S.C. § 1981.

On May 18, 2009, the district court granted MSN's and Respondents' Motions for Summary Judgment. The district court examined the merits of Petitioner's allegations against Oceanside under Section 1981 and Title VII that the Charge Nurse (Turk) would not sign what appeared to be Petitioner's time sheet after he refused to perform Patient Care Tech duties and told Petitioner, "Get out of here, I'm not signing anything, you stupid nigger." Petitioner's App. B, 21a. The court held that Oceanside was entitled to summary judgment on the merits because there was no evidence that the charge nurse singled Petitioner out for reassignment to Patient Care Tech duties because of his race, and because Petitioner's refusal to perform the duties to which he was assigned was sufficient to establish that Oceanside would have requested his

reassignment even in the absence of the alleged discriminatory animus. Petitioner's App. B, 22a.

The district court examined the merits of Petitioner's Title VII and Section 1981 claims against Fish Memorial that the Director of the Medical Surgical Department (Kaster) allegedly had addressed Petitioner on approximately three occasions by saying, "Hey, mon," and joked about him coming from a "banana boat," and that Petitioner allegedly had overheard Kaster, while speaking on the telephone, say, "That Jamaican boy, who does he think he is." Petitioner's App. B, 24a. The court held that Fish Memorial was entitled to summary judgment on the merits because Kaster's remarks – "Hey, mon," and "banana boat," and calling him a "Jamaican boy" – did not constitute direct evidence of discrimination because the remarks did not explicitly demonstrate an intent to discriminate against Petitioner and were not made in connection with any employment decision regarding Petitioner. Petitioner's App. B, 25a.

The court further held that Petitioner could not establish a prima facie case of discrimination through circumstantial evidence because there is no evidence that any employee from outside of his protected class was treated more favorably under similar circumstances. Petitioner's App. B, 25a.

Petitioner appealed the district court's order to the United States Court of Appeals for the Eleventh Circuit. Petitioner argued that summary judgment was inappropriate because there was allegedly direct evidence of racial discrimination at Oceanside and Fish (i.e., "an Oceanside supervisor calling him a 'nigger' after he refused to perform assigned duties,

and a Fish supervisor's references to his Jamaican heritage")

In its decision, the court explained that direct evidence of discrimination is "evidence which reflects a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee.'" Respondents' App. A., 8. The court further explained that "to qualify as direct evidence of discrimination, we require that a biased statement by a decision-maker be made concurrently with the adverse employment event, such that no inference is necessary to conclude that the bias necessarily motivated the decision." Respondents' App. A, 8. Applying its direct evidence standard to Petitioner's evidence, the court concluded that Petitioner did not meet that standard (or the standard applied to Petitioner's circumstantial evidence) and affirmed summary judgment in favor of Respondents on all of Petitioner's claims. Respondents' App. A, 10.

REASONS FOR DENYING THE PETITION

I. The Eleventh Circuit's Direct Evidence Standard Does Not Conflict With Other Federal Circuit Courts

Petitioner erroneously asserts that there is a split in the federal courts of appeal regarding the standard for direct evidence of discrimination in an employment termination case. Petitioner claims that the position taken by the Eleventh Circuit that "derogatory racial, ethnic or national origin remarks in the workplace do not constitute direct evidence of racial discrimination unless the supervisor/employer expressly and directly states that he/she is terminating an employee due to his race, ethnicity or national [sic]" (Petitioner's Brief, 12) is in conflict

with decisions of the Fourth and Seventh Circuits and the United States Supreme Court. In support of this contention, Petitioner cites *White v. BFI Waste Servs.*, 375 F.3d 288 (4th Cir. 2004); *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 182 (4th Cir. 2001); *Rogers v. Western-Southern Life Ins. Co.*, 12 F.3d 668 (7th Cir. 1993); and *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987). None of these cases supports Petitioner's allegation that the federal circuit courts apply a different standard for direct evidence in employment termination cases. Instead, Petitioner seeks to have the standard used by the federal circuit courts in hostile work environment cases applied to this employment termination case.

Petitioner also misstates the proposition cited by the Eleventh Circuit in holding that his evidence was not "direct evidence" of discrimination. In affirming the ruling of the district court, the Eleventh Circuit stated that "[a] biased statement, separate in time from the employment decision under challenge, is not direct evidence of discrimination. Absent this level of proof, the fact-finder is asked to infer that the racially-biased attitude revealed by the statement was what motivated the prior (or subsequent) employment decision, and the evidence is not direct evidence." Respondents' App. A, 8a.

The Eleventh Circuit has consistently held that direct evidence must establish discriminatory intent without inference or presumption. *Standard v. A.B.E.L. Servs.*, 161 F.3d 1318, 1330 (11th Cir. 1998) ("Direct evidence is evidence that establishes the existence of discriminatory intent behind the employment decision without any inference or presumption."); *Merritt v. Dillard Paper Co.*, 120

F.3d 1181, 1189 (11th Cir. 1997) ("We have defined direct evidence as 'evidence, which if believed, proves existence of fact in issue without inference or presumption.'") (quoting *Rollins v. TechSouth*, 833 F.2d 1525, 1528 n.6 (11th Cir. 1987)); *Carter v. City of Miami*, 870 F.2d 578, 581-582 (11th Cir. 1989) ("Direct evidence of discrimination would be evidence which, if believed, would prove the existence of a fact without inference or presumption.").

There is no conflict between the circuit courts regarding the standard for direct evidence of discrimination. Every circuit court which has addressed this question has held that evidence which requires an "inference" that discrimination was the motive for a discharge is not direct evidence, and that to constitute direct evidence of discriminatory intent statements must be made contemporaneous to the discharge. *See Haddon v. Executive Residence at the White House*, 313 F.2d 1352, 1359 (Fed. Cir. 2002) ("All the evidence pointed to by [Plaintiff] requires some inferences to get at a retaliatory motive for his discharge and does not qualify as direct evidence."); *Rios-Jimenez v. Principi*, 520 F.3d 31, 40 (1st Cir. 2008) (direct evidence of discrimination "does not include stray remarks in the workplace, particularly those made by nondecisionmakers or statements made by decisionmakers unrelated to the decisional process itself."); *Fisher v. Vassar College*, 70 F.3d 1420, 1450 (2d Cir. 1995) (holding that a plaintiff may establish a claim of discrimination through "direct evidence, such as statements by the employer that age was the reason for the discharge, ***or*** through proof of circumstances from which an *inference* of age discrimination may be drawn" (emphasis added)); *Josey v. John R. Hollingsworth Corp.*, 996 F.2d 632,

638 (3d Cir. 1993) (where direct "smoking gun" evidence of discrimination is unavailable, Circuit has found that the proper inquiry is whether the evidence offered "reasonably could support an *inference* that the employer did not act for non-discriminatory reasons" (emphasis added)); *O'Connor v. Consolidated Coin Caterers Corp.*, 56 F.3d 542, 548 (4th Cir. 1995) ("'Direct evidence of discrimination is evidence which, if believed, would prove the existence of a fact . . . without any inference or presumptions.'") (quoting *Bodenheimer v. PPG Indus.*, 5 F.3d 955, 958 (5th Cir. 1993)), *rev'd on other grounds*, 517 U.S. 308 (1996); *Jones v. Robinson Prop. Group*, 427 F.3d 987, 992 (5th Cir. 2005) (direct evidence is evidence which proves the fact without inference or presumption); *Goller v. Ohio Dep't of Rehab. & Correction*, 285 Fed. Appx. 250, 255, 2008 WL 2796080, at *4 (6th Cir. July 18, 2008) (derogatory racial slurs were not direct evidence of discrimination because "a significant inference would be required for a factfinder to conclude that . . . racial animosity motivated [the] decision to terminate"); *Robin v. Espo Engineering*, 200 F.3d 1081, 1089 (7th Cir. 2000) (in order for allegedly discriminatory remarks to qualify as direct evidence of discrimination, plaintiff must show that the remarks were related to the employment decision in question; court refused to "read invidious intent into isolated comments"); *Stephens v. Erickson*, 569 F.3d 779, 787 (7th Cir. 2009) (holding that direct evidence typically requires an actor's admission of discriminatory animus, but that a plaintiff may also prevail "by constructing a convincing mosaic of circumstantial evidence that allows a jury to *infer* intentional discrimination . . . ." (emphasis added)); *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328,

1337 (8th Cir. 1996) (dismissing discrimination claims because plaintiff produced neither direct evidence of discrimination nor "sufficient circumstantial evidence for a reasonable factfinder to *infer* that [plaintiff's protected status] 'actually motivated' his employer's decision to discharge him"); *Stegall v. Citadel Broadcasting Co.*, 350 F.3d 1061, 1066 (9th Cir. 2004) ("'Direct evidence is evidence which, if believed, proves the fact [of discriminatory animus] without *inference* or presumption.'" (emphasis added)) (quoting *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998)); *Sanders v. Southwestern Bell Tel.*, 544 F.3d 1101, 1105 (10th Cir. 2008) ("Direct evidence is evidence from which the trier of fact may conclude, without *inference*, that the employment action was undertaken because of the employee's protected status." (emphasis added)).

II. The Circuit Court Cases Cited by Petitioner Do Not Address the Direct Evidence Standard for Employment Termination Cases

All of the circuit court cases cited by Petitioner involve circumstantial evidence, rather than direct evidence, and harassment/hostile environment claims, rather than employment termination claims. In *White v. BFI Waste Servs.*, 375 F.3d at 297, a case involving harassment and a hostile work environment, the court reversed the lower court's grant of the employer's summary judgment motion, holding that evidence of the repeated use (as opposed to only on a few occasions) of the terms boy, jigaboo, nigger, porch monkey, Mighty Joe Young and Zulu Warrior was sufficient to create a triable issue of fact on the plaintiff's hostile environment claims.

Likewise, in *Spriggs v. Diamond Auto Glass*, 242 F.3d at 182, 185-86, the court reversed the lower court's grant of summary judgment for the employer finding that a white supervisor's "incessant racial slurs, insults, and epithets," vilification of "anyone of African descent," including other employees and customers whom he called "niggers" or "monkeys," and referring to his own wife, who was African-American, as a "black bitch" was sufficient evidence of a racially hostile environment to withstand summary judgment. In *Rogers v. Western-Southern Life Ins. Co.*, 12 F.3d at 671, 675-76, the Seventh Circuit affirmed a verdict in favor of the plaintiff in a racially hostile environment case where his supervisor used the word "nigger" twice in plaintiff's presence, stated that "you black guys are too f__king dumb to be insurance agents," and advised plaintiff that his boss had told him not to hire any more black agents.

In addition, in *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, this Court did not address whether racial comments constitute direct or circumstantial evidence, as Petitioner suggests. Instead, the Court simply held that § 1981 applies to an individual alleging race discrimination by virtue of his Arab ancestry. Petitioner asserts that "contrary to the Eleventh Circuit's contention, national origin discrimination was actionable under Petitioner's causes of action regardless of whether the subject comments were deemed racial." Petitioner's Brief, 20. Petitioner further asserts that [t]he Eleventh Circuit accepted the district court's determination that the statements were 'jokes' and further questioned whether the statements were racially discriminatory." Petitioner's Brief, 20. These assertions are a total mischaracterization of

the Eleventh Circuit's decision. The Eleventh Circuit stated that even if the statements were to be considered race-based, they "do not rise to the level of direct evidence under our precedent, as the fact-finder would have to infer from these comments that the supervisor's inappropriate racial attitudes motivated her decision to request that Petitioner no longer be assigned to Fish." Respondents' App A, 9.

Petitioner has not provided any argument or case authority that raises any legitimate question regarding the standard applied by the Eleventh Circuit for direct evidence in an employment termination case.

CONCLUSION

Petitioner's Petition for Writ of Certiorari should be denied because Petitioner has not raised an issue warranting the grant of certiorari.

Respectfully submitted.

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AUGUST 13, 2010

APPENDIX

APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED APRIL 13, 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-12936
Non-Argument Calendar

D.C. Docket No. 08-00032-CV-ORL-31-GJK

MICHAEL WILLIAMSON,

Plaintiff-Appellant,

versus

ADVENTIST HEALTH SYSTEM/SUNBELT, INC., A Florida Non Profit Corporation, SOUTHWEST VOLUSIA HEALTHCARE CORPORATION, A Florida Non Profit Corporation, d.b.a. Florida Hospital Fish Memorial, MEMORIAL HEALTH SYSTEMS, INC., A Florida Non Profit Corporation, d.b.a. Florida, Hospital – Oceanside, MEDICAL STAFFING NETWORK, INC., a Foreign for Profit Corporation,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(April 13, 2010)

Appendix A

Before DUBINA, Chief Judge, BLACK and PRYOR, Circuit Judges.

PER CURIAM:

Appellant Michael Williamson appeals from the district court order granting summary judgment in favor of all defendants on his race discrimination in employment claims, brought under 42 U.S.C. § 2000e-2 and 42 U.S.C. § 1981. In a two-count complaint, Williamson, a Jamaican-born black male, charged that he suffered race-based discrimination in employment at two separate hospitals where he worked as a temporary licensed practical nurse. After reviewing the briefs and the record, we affirm the district court order granting summary judgment in favor of the defendants.

I.

Pursuant to his contract with defendant Medical Staffing Network, Inc. ("MSN"), Williamson received temporary nursing assignments with defendants Florida Hospital-Oceanside ("Oceanside") and Florida Hospital Fish Memorial ("Fish"), in June and July 2006. Oceanside and Fish are subsidiaries of Advent Health System/Sunbelt, Inc, ("AHS"). Williamson charged in his complaint that Oceanside and Fish discriminated against him because of his race, and sued each of the defendants for the alleged violations of federal law.

Williamson contends that Oceanside effectively terminated his employment after he

refused to perform janitorial duties. He contends he was the subject of a racial epithet before Oceanside refused his future assignments to the hospital. Williamson contends that supervisors at Fish commented on his race and national origin more than once, and ultimately declined further assignments for him at the hospital because of his admitted failure to procure prescribed medicine for a patient during his shift. Williamson asserts that other permanent, non-minority nurses were not terminated when their performance was deficient.

Williamson alleges that AHS, as the controlling shareholder of subsidiaries Oceanside and Fish, exercised control over these entities and should be liable for their discriminatory conduct. The record evidence, however, consists only of sworn statements by AHS's in-house counsel and vice president of human resources, stating that even though AHS is the corporate parent of both Oceanside and Fish, the hospitals operate independently. They have their own corporate officers, board of directors, and human resources departments. Williamson also argues that MSN is liable for the racial discrimination in its role as a temporary staffing agency.

II.

We review a district court order granting summary judgment *de novo*, viewing all of the facts in the record in the light most favorable to the non-moving party. *Brooks v. County Comm'n of Jefferson County, Ala.*, 446 F.3d 1160, 1161-62 (11th Cir.

2006). Summary judgment is appropriate where the moving party demonstrates, through "pleadings, the discovery and disclosure materials on file, and any affidavits," that no issue of material fact exists, and it is "entitled to judgment as a matter of law." Fed. R. Civ. P 56(c).

III.

Williamson first argues that MSN is liable for its role in the discrimination inflicted by Fish and Oceanside under a "cat's paw" theory. We have held that a "cat's paw" theory of recovery may apply when a biased actor recommends that an adverse employment action be taken against an employee, but the biased actor is not the ultimate decision-maker. *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir. 1999). In such a situation, the employee must provide evidence that the recommender's alleged discriminatory animus directly caused the decision-maker to take adverse employment action against its employee. *Id.* at 1331.

We conclude from the record that the district court did not err in granting summary judgment in MSN's favor. Williamson testified that MSN did not give him any more assignments after Oceanside and Fish requested that he not be assigned to their respective hospitals again, showing that MSN passively acceded to the decisions of Oceanside and Fish in making its own adverse employment decision regarding Williamson. An application of the theory could only be made, however, after it has been

established that either Oceanside or Fish (or both) discriminated against Williamson. That is the essence of a "cat's paw" theory. Because Williamson failed to establish a *prima facie* case of racial discrimination against either Oceanside or Fish, as we conclude below, MSN was entitled to summary judgment on Williamson's "cat's paw" theory. As for direct liability, the district court properly determined that Williamson failed to provide any evidence that MSN itself discriminated against him, and we therefore affirm that ruling.

Williamson next argues that the district court erred in ruling as a matter of law that AHS could not be held liable for the alleged racial discrimination he suffered at Oceanside and Fish. He argues that AHS was his employer under the "economic realities" test, and that it could be held liable for interfering with his contract with MSN because AHS controlled Oceanside and Fish.

In determining whether two businesses should be treated as a joint employer for Title VII purposes, we apply the standards promulgated by the National Labor Relations Board ("NLRB"), which include: "(1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control." *McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 933 (11th Cir. 1987). We have separately adopted the "economic realties" test to determine whether a Title VII plaintiff is an employee of an

defendant business entity. *Cuddeback v. Fla. Dep't of Educ.*, 381 F.3d 1230, 1234 (11th Cir. 2004).

The district court's determination that AHS did not exercise control over Oceanside or Fish sufficient to impute liability for their alleged discriminatory actions is fully supported by the undisputed factual record. Williamson's bare assertions of corporate control do not negate the actual record evidence to the contrary. The undisputed facts preclude a finding that AHS was Williamson's employer under the NLRB standard or the "economic realities" test. They also establish Oceanside and Fish were operating as independent decision-makers in personnel matters, precluding any argument for liability against AHS under a "cat's paw" theory. Summary judgment in AHS's favor was therefore proper.

Williamson lastly argues that he provided direct and circumstantial proof of racial discrimination by Oceanside and Fish, and that the district court therefore erred in granting summary judgment in their favor. As direct evidence, Williamson cites an Oceanside supervisor calling him a "nigger" after he refused to perform certain assigned duties, and a Fish supervisor's references to his Jamaican heritage. Williamson relies on this same evidence as proof, under a circumstantial case analysis, that the hospitals' proffered non-discriminatory reasons were pretextual.

Title VII makes it unlawful for an employer "to discharge any individual, or otherwise to

discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). When a plaintiff uses circumstantial evidence in an attempt to prove discrimination or retaliation under Title VII, we may apply the burden shifting approach articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *Crawford v. Carroll*, 529 F.3d 961, 975–76 (11th Cir. 2008). Under the *McDonnell Douglas* framework, a plaintiff has the initial burden to establish a *prima facie* case of discrimination. *Crawford*, 529 F.3d at 976. To establish a *prima facie* case of discrimination under Title VII, a plaintiff must show that "(1) he is a member of a protected class; (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) he was . . . treated less favorably than a similarly situated individual outside his protected class." *Maynard v. Bd. of Regents of Div. of Univs. of Fla. Dep't of Educ.*, 342 F.3d 1281, 1289 (11th Cir. 2003). "To show that employees are similarly situated, the plaintiff must show that the employees are similarly situated in all relevant respects . . . ." *Knight v. Baptist Hosp. of Miami, Inc.*, 330 F.3d 1313, 1316 (11th Cir. 2003) (internal quotation marks omitted).

Once the plaintiff has made out the elements of the *prima facie* case, the employer must articulate a non-discriminatory basis for its employment action. *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1361, (11th Cir. 1999). If non-

discriminatory reasons are identified, the plaintiff must then show that the proffered reasons were pretextual. *Id.*; *Crawford*, 529 F.3d at 976. Specifically, to survive summary judgment, the employee must come forward with evidence sufficient to permit a reasonable fact finder to conclude that the legitimate reasons given by the employer were not its true reasons, but were a pretext for discrimination. *Chapman v. AI Transp.*, 229 F.3d 1012, 1024 (11th Cir. 2000) (*en banc*).

A plaintiff may, however, establish a *prima facie* case of discrimination through direct evidence. *Damon*, 196 F.3d at 1358. We have defined direct evidence "as evidence which reflects a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee." *Id.* (internal quotation marks omitted). "[T]he evidence must indicate that the complained-of employment decision was *motivated* by the decision-maker's [racial animus]." *Id.* at 1358-59 (emphasis in original). To qualify as direct evidence of discrimination, we require that a biased statement by a decision-maker be made concurrently with the adverse employment event, such that no inference is necessary to conclude that the bias necessarily motivated the decision. *See id.* at 1359.

The district court properly granted summary judgment in Oceanside's favor. Under our precedent, the Oceanside supervisor's alleged racial epithet does not constitute direct evidence of discrimination. A biased statement, separate in time from the

employment decision under challenge, is not direct evidence of discrimination. *See id.* Absent this level of proof, the fact-finder is asked to infer that the racially-biased attitude revealed by the statement was what motivated the prior (or subsequent) employment decision, and the evidence is not direct evidence.

The district court's summary judgment ruling as to Oceanside was likewise correct under a circumstantial case analysis. Williamson's refusal to perform the duties to which he was assigned provided a legitimate, non-discriminatory reason for Oceanside to not request him again, and Williamson provided nothing to show that this proffered reason was unworthy of credence, or otherwise pretextual. Moreover, Williamson did not offer any evidence that a non-black temporary licensed practical nurse or registered nurse was retained after refusing a staffing assignment.

The district court's summary judgment ruling as to Fish also was correct. The evidence primarily relied upon by Williamson regarding Fish consisted of references or jokes by a supervisor about his Jamaican heritage, occurring both before and after his final shift there. Even if considered race-based, however, these alleged comments do not rise to the level of direct evidence under our precedent, as the fact-finder would have to infer from these comments that the supervisor's inappropriate racial attitudes motivated her decision to request that Williamson no longer be assigned to Fish.

Appendix A

For purposes of a circumstantial analysis, the critical medication error, which Williamson admitted to during his final shift at Fish, provided a legitimate, non-discriminatory reason for Fish to ask that he not be assigned there again. Williamson provided nothing to show that this proffered reason was unworthy of credence or was pretextual. Williamson also failed to show that any similarly-situated employee outside of his protected class was treated differently under similar circumstances. We conclude that summary judgment in Fish's favor was therefore appropriate.

IV.

For the aforementioned reasons, we affirm the district court order granting summary judgment in favor of the defendants on all of Williamson's claims.

AFFIRMED.